No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS, COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

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MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS

The United States and the Federal Energy Regulatory Commission, by the Solicitor General, move for leave to intervene as plaintiffs in this action and to file the attached complaint in intervention on the ground that the United States is directly affected by the additional costs imposed by the Louisiana First Use Tax in its capacities as a consumer of natural gas in the operation of military and civilian installations and as a lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf.

Moreover, the First Use Tax directly conflicts with the authority of the Federal Energy Regulatory Commission to regulate the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas. These interests can

adequately be protected only if the United States and the Federal Energy Regulatory Commission are parties to the action.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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COMPLAINT IN INTERVENTION

I.

The jurisdiction of this Court is invoked under Section 1251(b)(2) of Title 28 of the United States Code.

II.

Plaintiff States seek a declaratory judgment that the Louisiana First Use Tax on Natural Gas (Act No. 294, 1978 La. Sess. Law. Serv. 482 (West)), is unconstitutional and an order permanently restraining the collection of the tax and compelling the refund of all revenues collected plus all interest earned on such revenues (Complaint at 6 para. II).

III.

Pursuant to Rule 42(4) the United States and the Federal Energy Regulatory Commission filed a brief *amici curiae* in support of the plaintiffs' motion for leave to file the complaint. On June 18, 1979, this Court granted the plaintiffs' motion for leave to file the complaint invoking the original jurisdiction of this Court.

On March 3, 1980, the Court appointed John F. Davis, Esquire, Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings.

IV.

Paragraphs III-XIV of the Complaint, describing the parties and the operation of the Louisiana First Use Tax, are adopted and incorporated herein by reference.

V.

Paragraphs XV-XXXII of the Complaint, describing the impact of the Louisiana First Use Tax upon the Plaintiff States and their citizens, are adopted and incorporated herein by reference.

VI.

The United States is a consumer of natural gas in the operation of military and civilian installations and is thereby directly affected by the additional costs imposed by the Louisiana First Use Tax.

VII.

The United States is the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction (see 43 U.S.C. 1331-1343). It is believed that if the federal government's lessees are subject to Louisiana First Use Tax, the revenues received by the United States from its leases will be significantly reduced.

VIII.

Under Article I, Section 8, clause 3 of the Constitution, the federal government is responsible for the regulation of interstate and foreign commerce.

The Louisiana First Use Tax violates the Commerce Clause insofar as it burdens natural gas moving in interstate commerce, is not applied to activities with a sufficient nexus with Louisiana, is not fairly apportioned, and is not fairly related to either the value of identifiable activities within the state, the taxpayer's investment in facilities within the state, its gross income from business or the percentage of business conducted within the state, or the length of the facilities or the distance traveled within the state.

The Louisiana tax also discriminates against interstate commerce. While Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchases of gas subject to its severance tax from shifting all or part of the tax to the producer. By prohibiting the shifting of the First Use Tax and allowing the shifting of the severance tax, Louisiana has imposed a tax on Outer Continental Shelf, federal enclave, and imported gas, which is greater than the tax imposed on gas produced within Louisiana.

The Louisiana First Use Tax discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits (La. Rev. Stat. Ann. §§ 47:1303, 47:647 (Cum. Supp.)) designed to ensure that gas that is consumed in Louisiana or that is subject to the Louisiana severance tax bears a lesser tax burden. Thus, Louisiana users and users of gas extracted within Louisiana enjoy a distinct commercial advantage in the form of lower prices for natural gas.

IX.

Under Article VI, clause 2, of the Constitution, "This Constititution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Under the Natural Gas Act, 15 U.S.C. 717-717w, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351, the Federal Regulatory Commission is responsible for the regulation of the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas.

The Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution. The principal impact of the tax is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves, and of gas imported from abroad and shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy Act has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

Wherefore, the United States and the Federal Energy Regulatory Commission respectfully pray that the Court:

(a) declare and adjudge, pursuant to 28 U.S.C. 2201, that the Louisiana First Use Tax is unconstitutional with respect to natural gas transported or sold in interstate or foreign commerce;

(b) permanently enjoin and prohibit defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce;

(c) order that all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon; and

(d) grant such relief as the Court may deem appropriate and necessary to protect the interests of the United States and the Federal Energy Regulatory Commission.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS

In our brief *amici curiae* of June 1979 in support of the plaintiffs' motion for leave to file a complaint and our brief *amici curiae* of November 1979 in support of plaintiffs' motion for judgment on the pleadings, we advised the Court that both the United States and the Federal Energy Regulatory Commission are directly affected by the Louisiana First Use Tax on Natural Gas.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by the additional costs imposed by the First Use Tax. The United States is also the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction. If the federal government's lessees are compelled to pay the First Use Tax, the revenues reserved by the United States from these leases could be significantly affected. Finally, the Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the

Supremacy Clause. The impact of the Louisiana tax is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves or of gas imported from abroad and shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy Act has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

At the time the plaintiffs moved for judgment on the pleadings, we supported their motion on the grounds that their claims were correct as a matter of law and that the resolution of the questions presented did not require the appointment of a Special Master. However, on March 3, 1980, the Court granted Louisiana's motion for appointment of a Special Master. At the preliminary meeting held on March 21, 1980, the Special Master indicated that some evidentiary hearing might be necessary and expressed the tentative view that only parties to this suit would be entitled to present evidence. Therefore, in light of the federal interests involved and the possibility that the United States may wish to introduce evidence in the case, intervention by the United States and the Federal Energy Regulatory Commission is appropriate to insure that the federal interests are fully protected.

CONCLUSION

For the reasons stated, the motion for leave to intervene as plaintiffs and to file the complaint in intervention should be granted.

Respectfully submitted,

WADE H. McCREE, JR.
Solicitor General

APRIL 1980